U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 16 September 2005

BALCA Case No.: 2004-INA-00333
ETA Case No.: P2003-NJ-02487303

In the Matter of:

DC CONSTRUCTION OF NEW JERSEY, INC.,
Employer,

on behalf of

CHRISTIAN ANDRADE,
Alien.

Appearance: Wall Street Associates, Inc.
Newark, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from DC Construction of New Jersey's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.[1] We base our decision on the record upon

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On September 30, 2001, Employer filed an application for labor certification on behalf of Alien, seeking to fill the position of "Truss Carpenter" and requiring three years experience. (AF 136-148). Employer requested Reduction in Recruitment ("RIR") processing. (AF 148).

On October 22, 2003, the CO issued a Notice of Findings ("NOF I") denying Employer's request for RIR and proposing to deny labor certification pursuant to sections 656.3, 656.20(c)(5), and 656.20(c)(8). The CO explained that Employer had to demonstrate that it could guarantee permanent, full-time employment to Alien performing the job duties listed on form 7-50A: erecting pre-made and flat roof trusses on top plates of frame structures for residential or commercial projects. Accordingly, Employer was instructed to provide copies of contracts and invoices from 2001 through 2003 demonstrating the need for a full-time truss carpenter. In addition, Employer was instructed to submit the names and job duties of its employees from 2001 through 2003, W-2 or 1099-MISC forms for 2001 and 2002, and Federal tax returns for 2001 and 2002. Employer was also instructed to provide the names of its corporate officers from its inception because the local telephone directory included a residential listing for Alien at Employer's address. The CO also noted that three years of experience was required for the position, but no experience was listed in form 7-50B, item 15. Employer was instructed to either submit evidence demonstrating that Alien had the requisite experience or deleting the requirements for the position. Employer was also instructed to demonstrate its willingness to advertise for the position, which would be contingent upon successfully rebutting the NOF. (AF 84-86).

On November 21, 2003, Employer filed rebuttal material that contained the following: a corrected form 7-50B; copies of Alien's W-2 forms from 2001 and 2002; a list of Employer's

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Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

workers and their job duties in 2001 and 2002; the employees' W-2s for 2002; copies of Employer's tax returns for 2001 and 2002; contracts and estimates for work performed in 2001, 2002, and 2003; and a copy of phone bills due in September 2003. Employer also included a letter that explained the nature of Employer's business and listed Emir Dinis as "the boss from the beginning." Employer further explained that it occupies the first floor of 317 Lafayette Street in Newark, New Jersey, where Alien lives on the second floor, and that the phone number given as Employer's was in Alien's name for "credit reasons." (AF 49-83).

On January 20, 2004, the CO issued a second NOF ("NOF II"). The CO determined that Employer had demonstrated that Alien had three years experience. However, the CO noted that the five contracts submitted in the rebuttal pertained to roofing as opposed to installing trusses. Further, the CO noted that an advertisement in a directory for Brazilian businesses listed Employer's business as "Slate & Tile/ Copper Roofing/ Spanish Tile/ Rubber Systems." Moreover, the CO explained that Employer's website indicated that it specialized in roofing, not truss carpentry. The CO also noted that the Brazilian directory listed Alien as its contact person and its address as being the third floor of 317 Lafayette Street. In addition, the CO noted that Employer was listed as "DC Construction of NJ" in the case file, but its rebuttal was on letterhead that read "DC Construction of Newark." Employer was instructed to further document the nature of its business because the contracts it provided did not demonstrate the need for a full-time truss carpenter. Moreover, Employer's list of employees contained one truss carpenter in addition to Alien. Accordingly, Employer was instructed to define "truss carpenter" and the specific duties performed by a truss carpenter. The CO also requested further explanation regarding Alien's role in the company and Employer's "credit problems." The CO reasoned that Alien was so closely connected to the company that it appeared that no *bona fide* job opportunity exists. (AF 29-32).

On February 12, 2004, Employer filed a rebuttal to NOF II. Employer explained that a truss carpenter "erects pre-made and flat roof trusses on top plates of frame structures for residential/commercial development projects." It also explained that it is actually "two companies in one": DC Construction of NJ (specializing in carpentry) and DC Construction of Newark (specializing in roofing). Further, it explained that its advertising efforts concentrate on

roofing because these contracts are more difficult to obtain, and the roofing business has no connection to Alien or the carpentry work that he performs. The Employer also reiterated – without additional explanation – that one of its phone numbers is in Alien's name because Employer's credit "is not perfect." Employer also asserted that the contracts submitted in response to the NOF demonstrate the need for a truss carpenter and that the tax returns submitted demonstrate Employer's ability to employ Alien on a full-time basis. (AF 20-28).

On March 24, 2004, the CO issued a Final Determination denying labor certification pursuant to section 656.20(c)(8). The CO noted that the Employer's rebuttal to NOF II stated that the roofing work was performed under the name "DC Construction of Newark" and that contracts submitted with the first rebuttal adequately demonstrated the need for a full-time truss carpenter. The CO also noted, however, that four of the five contracts submitted with the first rebuttal were drafted by "DC Construction of Newark." Accordingly, the CO concluded that a *bona fide* job opportunity did not exist because Employer had not demonstrated that it could guarantee full-time employment performing the job duties listed in the application. (AF 15-17). On April 16, 2004, Employer requested review of the Final Determination. (AF 4-14). The Board of Alien Labor Certification Appeals ("Board") docketed the case on August 24, 2004.

DISCUSSION

An employer petitioning for permanent alien labor certification must demonstrate that the job opportunity offered to the alien "has been and is clearly open to any qualified U.S. worker." 20 C.F.R. § 656.20(c)(8). A "totality of the circumstances" test is used to determine whether a job opportunity is *bona fide*. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). The burden of showing that the job opportunity is *bona fide* is on the employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*).

Here, the CO denied certification because Employer failed to demonstrate that a *bona fide* job opportunity existed. In NOF I, the CO properly requested that Employer submit tax documents, invoices and contracts demonstrating the need for a truss carpenter, and a list of its employees' names and job duties to verify that it could guarantee permanent, full-time

employment to Alien performing the job duties listed in the application. *See Gencorp*, 1987-INA-00659 (January 13, 1988) (*en banc*) (a CO may request a document which has a direct bearing on the resolution of an issue). An employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification, *Edward Gerry*, 93-INA-467 (Jun. 13, 1994), especially where the employer does not justify its failure. *Vernon Taylor*, 89-INA-258 (Mar. 12, 1991).

Here, Employer claimed that the roofing work was performed by DC Construction of Newark and that this work had no connection to Alien. Employer also stated that the contracts offered to rebut NOF I established that it could guarantee work for a full-time truss carpenter. However, four of these contracts were issued in the name of DC Construction of Newark – which purportedly is Employer's roofing division and has no connection to Alien. Thus, Employer only produced one contract that was allegedly performed by its carpentry division. Even if this contract were deemed to include services for truss carpentry, one contract in three years is nevertheless inadequate to demonstrate the need for a full-time truss carpenter. Moreover, Employer failed to explain the nature of its "credit problems." Accordingly, Employer did not meet its burden, and the CO properly denied certification.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as, here, when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five doublespaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.